

KOK WAH KUAN

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v.

PP

COURT OF APPEAL, PUTRAJAYA

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GOPAL SRI RAM JCA

ZULKEFLI MAKINUDIN JCA

RAUS SHARIF JCA

[CRIMINAL APPEAL NO: W-05-69-2003]

12 JULY 2007

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[2007] CLJ JT(2)

CONSTITUTIONAL LAW: *Constitution - Doctrine of separation of powers - Whether s. 97(2) Child Act 2001 contravened doctrine - Whether rendered unconstitutional - Federal Constitution, arts. 4(1), 39, 121 - Constitution (Amendment) Act 1988 [Act A704], s. 8 - Child Act 2001, s. 97(4)*

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CRIMINAL LAW: *Murder - Sentence - Child accused - Sentenced to detention in prison during the pleasure of Yang di-Pertuan Agong pursuant to s. 97(2) Child Act 2001 - Whether s. 97(2) unconstitutional - Whether sentence set aside*

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CRIMINAL PROCEDURE: *Sentence - Appeal - Child appellant convicted of murder ordered to be detained in prison during the pleasure of Yang di-Pertuan Agong pursuant to s. 97(2) Child Act 2001 - Whether s. 97(2) unconstitutional - Whether sentence set aside*

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The child appellant was convicted of murder by the High Court and was ordered to be detained in prison during the pleasure of the Yang di-Pertuan Agong pursuant to s. 97(2) of the Child Act 2001 ('the Act'). In this appeal, it was argued on behalf of the appellant that by sentencing the appellant to detention during the pleasure of the Yang di-Pertuan Agong, the judicial power of punishment was vested in the Executive arm of the Federation thereby violating the doctrine of separation of powers embodied in the Federal Constitution ('the Constitution').

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Held (dismissing appeal against conviction and setting aside sentence)

Per Gopal Sri Ram JCA delivering the judgment of the court:

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(1) The amendment by the Constitution (Amendment) Act 1988 [Act A704] deleted the expression "judicial power" from the opening words in art. 121 of the Constitution. However, the

- A amendment did not have the effect of divesting the courts of the judicial power of the Federation for the following reasons. Firstly, the amendment did nothing to vest the judicial power in some arm of the Federation other than the courts. Neither did it provide for the sharing of the judicial power with the
- B Executive or Parliament or both those arms of Government. Secondly, the marginal note to art. 121 was not amended. That clearly expressed the intention of Parliament not to divest the ordinary courts of the judicial power of the Federation and not to transfer it to or share it with either the Executive or
- C the Legislature. (para 4)
- (2) The doctrine of separation of powers was very much an integral part of the Constitution. Article 4(1) of the Constitution declared the Constitution to be the supreme law. It followed that any state action that violated the doctrine of
- D separation of powers must be struck down as unconstitutional. (para 8)
- (3) From a plain reading of s. 97(2) of the Act, it was clear that Parliament had consigned the power to determine the measure of the sentence that was to be served to the Yang di-Pertuan Agong in the case of an offence committed in any of the Federal Territories and to the Ruler or Governor in the case of the states of the Federation. By virtue of art. 39 of the
- E Constitution, the executive authority of the Federation was vested in the Yang di-Pertuan Agong. The Yang di-Pertuan Agong must, in accordance with art. 40(1) of the Constitution, act in accordance with the advice given by the Cabinet or a particular Minister of the Cabinet. Therefore, s. 97(2) of the
- F Act clearly contravened the doctrine of separation of powers housed in the Constitution by consigning to the Executive the judicial power to determine the measure of the sentence that was to be served by the appellant. (paras 12 & 13)
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- (4) Section 97(4) of the Act did not rescue s. 97(2) of the same from unconstitutionality. In fact s. 97(4) confirmed that it was the Yang di-Pertuan Agong who determined the measure of the sentence that was to be served, save that it was a power that was exercised on the advice of a Board of Visiting Justices. Hence, s. 97(4) of the Act was merely a procedural adjunct to the principal power to determine the measure of
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- I the sentence that the appellant was to serve. (para 13)

- (5) There was abundant material on record to support the conviction of the appellant. The victim was found to have had 20 stab wounds. That clearly pointed to an intention to kill. There was absolutely no evidence to bring the case within one of the exceptions. The learned trial judge admirably dealt with the evidence and drew proper inferences from it. The conviction therefore was entirely safe. (para 15)

Obiter:

- (1) The court's finding that s. 97(2) of the Act was inconsistent with the Constitution did not extend to a declaration of unconstitutionality of other equipollent provisions. The validity of those other provisions must be dealt with on a case by case basis as and when the occasion arose. (para 14)
- (2) The cases of *Liyanage v. The Queen* and *Hinds v. The Queen* were in the law reports since 1967 and 1976 respectively. Both were applied by our courts long before the Act was drafted. It was unfortunate that those charged with the drafting of the Act did not pay proper attention to the decided cases. If they had done so, the incongruent and unfortunate circumstances now before this court might well have been avoided. (para 18)

Bahasa Malaysia translation of headnotes

Perayu, seorang kanak-kanak, telah disabit oleh Mahkamah Tinggi dengan kesalahan bunuh dan diperintah ditahan di penjara menurut ihsan Yang di Pertuan Agong di bawah s. 97(2) Akta Kanak-Kanak 2001 ('Akta'). Dalam rayuan di sini, diujahkan bagi pihak perayu bahawa dengan menghukum perayu supaya ditahan di bawah ihsan Yang di Pertuan Agong, maka kuasa kehakiman untuk menghukum telah diletakhak ke atas cabang eksekutif Persekutuan sekaligus melanggar doktrin pengasingan kuasa seperti yang tertera di dalam Perlembagaan Persekutuan ('Perlembagaan').

Diputuskan (menolak rayuan terhadap sabitan dan mengenepikan hukuman)

Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

- (1) Pindaan oleh Akta (Pindaan) Perlembagaan 1988 [Akta A704] telah menghapuskan ungkapan "kuasa kehakiman" dari mukaddimah art. 121 Perlembagaan. Namun begitu, pindaan tidak membawa kesan melucutkan kuasa kehakiman Persekutuan mahkamah atas sebab-sebab berikut. Pertama, pindaan tidak

- A membuat apa-apa untuk meletakkan kuasa kehakiman ke atas mana-mana cabang Persekutuan selain dari mahkamah. Ia juga tidak memperuntukkan supaya kuasa kehakiman dikongsi dengan Eksekutif atau Parlimen atau dengan kedua-dua cabang Kerajaan tersebut. Kedua, nota sisi kepada art. 121 tidak dipinda. Itu jelas menunjukkan niat Parlimen untuk tidak melucutkan kuasa kehakiman Persekutuan dari mahkamah biasa dan untuk tidak memindahkannya kepada atau dikongsi bersama dengan Eksekutif mahupun Badan Perundangan.
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- C (2) Doktrin pengasingan kuasa merupakan satu bahagian penting Perlembagaan. Artikel 4(1) Perlembagaan mengisytiharkan bahawa Perlembagaan adalah undang-undang tertinggi. Ianya mengikut bahawa mana-mana tindakan negeri yang melanggar doktrin pengasingan kuasa hendaklah dibatalkan kerana tidak berperlembagaan.
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- E (3) Dari pembacaan biasa s. 97(2) Akta, jelas bahawa Parlimen telah menyerahkan kuasa untuk menentukan bentuk hukuman yang perlu dijalaninya kepada yang di-Pertuan Agong dalam kes di mana kesalahan dilakukan di Wilayah-Wilayah Persekutuan dan kepada Raja atau Gabenor jika ia dilakukan di negeri-negeri di Persekutuan. Berdasarkan art. 39 Perlembagaan, kuasa eksekutif Persekutuan telah diletakkan ke atas Yang di-Pertuan Agong. Yang di-Pertuan Agong hendaklah, selaras dengan art. 40(1) Perlembagaan, bertindak mengikut nasihat yang diberi oleh kabinet atau seorang Menteri Kabinet tertentu. Oleh itu, s. 97(2) Akta jelas melanggar doktrin pengasingan kuasa yang tertera di dalam Perlembagaan kerana menyerahkan kepada Eksekutif kuasa kehakiman untuk menentukan bentuk hukuman yang perlu dijalaninya oleh perayu.
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- G (4) Seksyen 97(4) Akta tidak dapat menyelamatkan s. 97(2) dari ketidak-berperlembagaan. Malahan, s. 97(4) mengesahkan bahawa Yang di-Pertuan Agonglah yang menentukan bentuk hukuman yang akan dijalaninya, kecuali bahawa ia adalah satu kuasa yang dilaksanakan atas nasihat Lembaga Hakim-Hakim Pelawat. Oleh itu, s. 97(4) Akta hanyalah merupakan 'procedural adjunct' kepada kuasa utama untuk menentukan bentuk hukuman yang harus dijalaninya oleh perayu.
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- I (5) Terdapat banyak material pada rekod bagi menyokong pensabitan perayu. Mangsa didapati mengalami 20 kesan luka kerana tikaman. Itu jelas menunjuk kepada niat untuk membunuh. Selain itu tiada keterangan langsung yang boleh membawa kes ke dalam mana-mana pengecualian. Maka yang

arif hakim telah menangani keterangan-keterangan dengan penuh terpuji dan telah membuat inferens-inferens wajar darinya. Sabitan dengan itu adalah amat selamat.

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Obiter:

(1) Dapatan mahkamah bahawa s. 97(2) Akta adalah tidak konsisten dengan Perlembagaan bukanlah satu perisytiharan tentang ketidak-berperlembagaan peruntukan-peruntukan 'equipollent' lain. Kesahan peruntukan-peruntukan tersebut hendaklah ditangani berdasarkan 'case to case basis' jika dan bila ianya berbangkit.

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(2) Kes-kes *Liyanage v. The Queen* dan *Hinds v. The Queen* sudah berada di dalam laporan undang-undang sejak 1967 dan 1976 masing-masingnya. Keduanya telah digunapakai oleh mahkamah kita lama sebelum Akta digubal. Adalah malang bahawa mereka yang dipertanggungjawabkan dengan penggubalan Akta tidak memberi perhatian sewajarnya kepada kes-kes yang diputuskan. Jika mereka berbuat demikian, kes-kes malang dan canggung yang berada di hadapan mahkamah ini mungkin dapat dielakkan.

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Case(s) referred to:

Assa Singh v. Menteri Besar, Johore [1969] 2 MLJ 30 (*refd*)

Bengal Immunity Co Ltd v. State of Bihar AIR [1955] SC 661 (*refd*)

Director of Public Prosecutions v. Mollison [2003] UKPC 6 (*refd*)

Hinds v. The Queen [1976] 1 All ER 353 (*refd*)

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Huddart, Parker and Co Proprietary Ltd v. Moorehead [1908–1909] 8 CLR 330 (*refd*)

In re the Special Courts Bill, 1978 AIR [1979] SC 478 (*refd*)

Kerajaan Negeri Selangor v. Saggong Tasi [2005] 4 CLJ 169 CA (*refd*)

Liyanage v. The Queen [1967] 1 AC 259 (*refd*)

Public Prosecutor v. Dato' Yap Peng [1987] 2 MLJ 311 (*refd*)

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Shell Co of Australia Ltd v. Federal Commissioner of Taxation [1931] AC 275 (*refd*)

Soon Kim Seng v. Public Prosecutor [1978] 2 MLJ 107 (*refd*)

Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah & Anor [1998] 3 CLJ 85 CA (*fol*)

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Surinder Singh Kanda v. The Federation of Malaya [1962] MLJ 169 (*refd*)

Legislation referred to:

Child Act 2001, s. 97(2), (4)

Constitution (Amendment) Act 1988 [Act A704], s. 8

Criminal Procedure Code, s. 348

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Federal Constitution, arts. 4(1), 39, 40(1), 121

Penal Code, s. 302

- A Federal Constitution [Aust], s. 71
Juveniles Act 1951 [Jamaica], s. 29(1)

For the appellant - Karpal Singh (Ramkarpal Singh with him); M/s Karpal Singh & Co

- B *For the respondent - Yaacob Sam (Mangai with him); AG's Chambers*

[Appeal from High Court, Kuala Lumpur; Criminal Trial No: 45-27-2002]

Reported by Usha Thiagarajah

JUDGMENT

- C **Gopal Sri Ram JCA:**

[1] The appellant before us was convicted of the offence of murder under s. 302 of the Penal Code alleged to have been committed on 30 May 2002 in the Federal Territory of Kuala Lumpur. He was then 12 years and 9 months old. His conviction was entered on 1 July 2003 and he was ordered to be detained during the pleasure of the Yang di-Pertuan Agong pursuant to s. 97(2) of the Child Act 2001. Section 97 reads as follows:

- E (1) A sentence of death shall not be pronounced or recorded against a person convicted of an offence if it appears to the Court that at the time when the offence was committed he was a child.
- F (2) *In lieu* of a sentence of death, the Court shall order a person convicted of an offence to be detained in a prison during the pleasure of:
- G (a) the Yang di-Pertuan Agong if the offence was committed in the Federal Territory of Kuala Lumpur or the Federal Territory of Labuan; or
- (b) the Ruler or the Yang di-Pertua Negeri, if the offence was committed in the State.
- (3) If the Court makes an order under subsection (2) that person shall, notwithstanding anything in this Act:
- H (a) be liable to be detained in such prison and under such conditions as the Yang di-Pertuan Agong or the Ruler or the Yang di-Pertua Negeri may direct; and
- (b) while so detained, be deemed to be in lawful custody.
- I (4) If a person is ordered to be detained at a prison under subsection (2), the Board of Visiting Justices for that prison:
- (a) shall review that person's case at least once a year; and

(b) may recommend to the Yang di-Pertuan Agong or the Ruler or the Yang di-Pertua Negeri on the early release or further detention of that person and the Yang di-Pertuan Agong or the Ruler or the Yang di-Pertua Negeri may thereupon order him to be released or further detained, as the case may be.

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[2] The appellant now argues that s. 97 is *ultra vires* the Federal Constitution in that it violates the doctrine of separation of powers housed in the supreme law. The argument is that the power to impose punishment in a criminal case is a judicial power. What s. 97 does, according to learned counsel for the appellant, is to vest this judicial power of punishment in the executive arm of the federation. Two issues therefore arise out of the appellant's complaint. First, whether the doctrine of separation of powers is an integral part of the Constitution: second, whether s. 97 in pith and substance violates that doctrine.

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[3] Prior to 10 June 1988, art. 121 of the Constitution opened with the words "the judicial power of the Federation shall be vested". This phrase was taken by the framers of our Constitution from s. 71 of the Australian Constitution. It was interpreted by Griffith CJ in *Huddart, Parker and Co Proprietary Ltd v. Moorehead* [1908-1909] 8 CLR 330, to mean:

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... the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision ... is called upon to take action.

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This definition was cited with approval by the Privy Council in *Shell Co of Australia Ltd v. Federal Commissioner of Taxation* [1931] AC 275.

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[4] However, by Act A704, art. 121 was amended with effect from 10 June 1988 and the expression "judicial power" was deleted. No challenge as to the constitutionality of Act A704 was ever taken before any court. To our minds such a challenge, even if taken, would have failed because the amendment did not have the effect of divesting the courts of the judicial power of the Federation. There are two reasons for this. First, the amending Act did nothing to vest the judicial power in some arm of the Federation other than the courts. Neither did it provide for the sharing of the judicial power with the Executive or Parliament or both those arms of Government. Second, the marginal note to art.

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A 121 was not amended. This clearly expresses the intention of Parliament not to divest the ordinary courts of the judicial power of the Federation and to transfer it to or share it with either the Executive or the Legislature.

B [5] Now, marginal notes are admissible guides to statutory interpretation. Indeed:

It is now well settled that a marginal note is a part of the section. It is the key to open the mind of the legislature by affording guidance in understanding their intendment. See, *The Film*

C *Exhibitors Guild v. State* AIR [1987] AP 110, per K Ramaswamy J on behalf of the Full Bench.

Of course, guidelines for statutory interpretation should not be applied when interpreting a Constitution. See, *Hinds v. The Queen* [1976] 1 All ER 353, per Lord Diplock. But, a marginal note in a written Constitution is nevertheless part of the supreme law and “furnishes some clue as to the meaning and purpose of the article”. See, *Bengal Immunity Co. Ltd v. State of Bihar* AIR [1955] SC 661, per Das, Ag CJ at para. 24.

E [6] In *Sugumar Balakrishnan v. Pengarah Imigresen Negeri Sabah & Anor* [1998] 3 CLJ 85, this court said:

The Constitution of Sri Lanka (formerly Ceylon) does not even mention the expression judicial power. Yet, upon high authority it has been held that despite the omission, the provisions in that document:

... manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a Constitution which intends that judicial power shall be vested only in the judicature. They would be inappropriate in a Constitution by which it was intended that judicial power should be shared by the executive or the legislature. The Constitution’s silence as to the vesting of judicial power is consistent with its remaining, where it had lain for more than a century, in the hands of the judicature. It is not consistent with any intention that henceforth it should pass to or be shared by, the executive or the legislature (per Lord Pearce in *Liyanage v. The Queen* [1967] 1 AC 259 at p 287).

I The Indian Constitution also does not make mention of judicial power being vested in the judiciary. Yet, the same position obtains there as in Sri Lanka. See *Minerva Mills Ltd v. Union of India* AIR [1980] SC 1789. Like the Constitutions of Sri Lanka and India, the Federal Constitution preserves the separation of powers

between the three arms of Government and evinces no intention that the judicial power of the Federation shall be passed to or shared with the Executive or the Legislature. It follows that the judicial power of the Federation remains where it has always been, namely, with the judiciary.

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That is a view to which we still adhere.

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[7] In *Hinds v. The Queen*, Lord Diplock made two observations that are applicable to the case at hand. In the first place he said of the Jamaican Constitution that:

It is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government.

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He then made this further observation:

What, however, is implicit in the very structure of a Constitution on the Westminster model is that judicial power, however it be distributed from time to time between various courts, is to continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the Chapter dealing with the judicature, even though this is not expressly stated in the Constitution: *Liyanage v. The Queen* [1967] 1 AC 259, 287-288.

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[8] Based on the foregoing discussion, it is in our judgment beyond argument that the doctrine of separation of powers is very much an integral part of the Federal Constitution. Since art. 4(1) declares the Constitution to be the supreme law, it follows that any State action that violates the doctrine of separation of powers must be struck down as unconstitutional. And that brings us to the second issue that has fallen for determination.

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[9] In support of his argument that s. 97(2) violates the doctrine of separation of powers between the Executive and the Judiciary, learned counsel for the appellant relied on *Director of Public Prosecutions v. Mollison* [2003] UKPC 6. The facts of that case were these. The accused, Mollison was convicted of the murder one Leila Brown during a robbery, an offence which, by the law of Jamaica carried the death penalty. However, as Mollison was 19 years at the date of his conviction the trial judge, acting under s. 29(1) of the Juveniles Act 1951 of Jamaica, ordered detention during the Governor-General's pleasure. Subsections (1) and (4) of that section provided as follows:

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- A (1) Sentence of death shall not be pronounced on or recorded against a person convicted of an offence if it appears to the Court that at the time when the offence was committed he was under the age of eighteen years, but in place thereof the court shall sentence him to be detained during Her Majesty's pleasure, and, if so sentenced, he shall, notwithstanding anything in the other provisions of this Law, be liable to be detained in such place (including, save in the case of a child, an adult correctional centre) and under such conditions as the Minister may direct, and while so detained shall be deemed to be in legal custody.
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- C (4) The Governor-General may release on licence any person detained under subsection (1) or (3) of this section. Such licence shall be in such form and contain such conditions as the Governor-General may direct, and may at any time be revoked or varied by the Governor-General. Where such licence is revoked the person to whom it relates shall return forthwith to such place as the Governor-General may direct, and if he fails to do so may be arrested by any constable without warrant and taken to such place.
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- E [10] Mollison argued that s. 29 was incompatible with the separation of judicial from executive power which he said was a fundamental principle upon which the Constitution of Jamaica was built. The argument found favour with the Privy Council. Lord Bingham of Cornhill who delivered the advice of the Board after having initially considered the accused's submission on the point
- F ambitious nevertheless treated it as having already been settled by the Board's decision in *Hinds*. He also made the following observation of s. 29 which, in our judgment, is the fulcrum upon which the case turned:
- G It is also a key feature of this sentence in Jamaica (although no longer in the United Kingdom) that the decision on release is entrusted to the Governor-General as a member of the executive. Section 29(4) of the Juveniles Act as amended has that express effect. This feature also has been clearly recognised: see *The State v. O'Brien* [1973] IR 50 at 59-60, 64, 71-72; *R v. Secretary of State, Ex p Venables* [1998] AC 407 at 498-499, 519-524, 530-532; *Browne v. the Queen* [2000] 1 AC 45 at 48; *V v. United Kingdom* [1999] 30 EHRR 121, paras 110-111. Thus while, in a case falling within section 29(1), the judge sitting in court passes sentence, it falls to the executive to determine the measure of punishment which an individual detainee will undergo: *Hinds v. The Queen* [1977] AC 195 at 227-228. It is clear that such determination is for all legal and practical purposes a sentencing exercise: see *R (Anderson) v. Secretary of State for the Home*
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Department [2002] 3 WLR 1800, pp 1812, 1822-1823, 1830, [2002] UKHL 46, paras 24, 52, 74 and the authorities there cited.

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[11] Two points emerge from the above-quoted passage. First, the power to pass sentence and the power to determine the measure of punishment are both part of the judicial power. Second, that s. 29 consigned the latter power to the Executive. We may add that our courts have already held that the sentencing power is a judicial power. Thus in *Public Prosecutor v. Dato' Yap Peng* [1987] 2 MLJ 311, Zakaria Yatim J (whose decision was upheld by the Supreme Court) said:

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In the context of criminal law, the Court possesses the judicial power to try a person for an offence committed by him and to pass sentence against him if he is found guilty.

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[12] Now, look at s. 97(2). It is clear from its plain reading that Parliament has consigned the power to determine the measure of the sentence that is to be served to the Yang di-Pertuan Agong in the case of an offence committed in any of the Federal Territories and to the Ruler or Governor in the case of the several States of the Federation. By art. 39 of our Constitution, the executive authority of the Federation is vested in the Yang di Pertuan Agong. Save on certain matters that are not in issue here, the Yang di Pertuan Agong is a constitutional monarch and must, in accordance with art. 40(1), act in accordance with the advice given him by the Cabinet or a particular Minister of the Cabinet. Thus:

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when one finds in the Constitution itself or in a Federal law powers conferred upon the Yang di-Pertuan Agong that are expressed to be exercisable if he is of opinion or is satisfied that a particular state of affair exists or that particular action is necessary, the reference to his opinion or satisfaction is in reality a reference to the collective opinion or satisfaction of the members of the Cabinet, or the opinion or satisfaction of a particular Minister to whom the Cabinet have delegated their authority to give advice upon the matter in question", per Lord Diplock in *Teh Cheng Poh v. Public Prosecutor* [1979] 1 MLJ 50.

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[13] In our judgment, applying settled principles, s. 97(2) clearly contravenes the doctrine of separation of powers housed in the Constitution by consigning to the Executive the judicial power to determine the measure of the sentence that is to be served by the instant appellant. Section 97(4) does not, in our considered judgment, rescue the second subsection from unconstitutionality. If anything it compounds the problem. For, that subsection does in

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- A fact confirm that it is the Yang di Pertuan Agong who determines the measure of the sentence that is to be served, save that it is a power that is exercised on the advice of a Board of visiting justices. Hence s. 97(4) is merely a procedural adjunct to the principal power to determine the measure of the sentence that the
- B appellant is to serve.

- [14] There are two short matters that need to be dealt with before we conclude. First, it was pointed out during argument that there may be other statutes, eg, s. 348 of the Criminal Procedure
- C Code, which make provision for the detention of persons at the pleasure of the Yang di Pertuan Agong, or a Ruler or Governor. It was said that striking down s. 97(2) may affect those other provisions. With respect, we do not agree. As was pointed out by the Indian Supreme Court in *In re the Special Courts Bill*, 1978
- D AIR [1979] SC 478, the constitutionality of a particular provision must be determined in each case as it arises. Our conclusion that s. 97(2) is inconsistent with the Constitution does not extend to a declaration of unconstitutionality of other equipollent provisions. The validity of these other provisions must be dealt with on a
- E case by case basis as and when the occasion arises. In the specific case of s. 348 of the Criminal Procedure Code, it is a pre-Merdeka and hence a pre-Constitution provision. It must therefore be dealt with in accordance with the principles set out in *Assa Singh v. Menteri Besar, Johore* [1969] 2 MLJ 30 which were applied
- F by this court in *Kerajaan Negeri Selangor v. Saggong Tasi* [2005] 4 CLJ 169. In the case of pre-Merdeka statutes, the courts are empowered to “apply the existing law with such modifications as may be necessary to bring it into accord with the Constitution”: *Surinder Singh Kanda v. The Federation of Malaya* [1962] MLJ 169,
- G per Lord Denning). We do not have such a power in respect of laws enacted post-Merdeka. In respect of such laws, the only power we have, under art. 4(1) of the Constitution is to either uphold them as being *intra vires* the supreme law or strike them
- H down as being inconsistent with it. Consequently, once a law is found to violate the Constitution the court has no choice but to declare it void and of no effect. So much for the constitutional ground.

- [15] The other point in the case is this. Learned counsel for the appellant when opening his argument said that quite apart from the constitutional argument, there were other grounds in the
- I petition of appeal which he said he would leave on file. This, of course, required the learned deputy who responded to the appeal to argue the merits of the appeal. We must say at once that this

was a gruesome murder and that there is abundant material on record to support the conviction of the appellant. The victim in this case was found to have had 20 stab wounds. This clearly points to an intention to kill. There is absolutely no evidence to bring the case within one of exceptions. The learned trial judge admirably dealt with the evidence and drew the proper inferences from it. In our judgment the conviction is therefore entirely safe.

[16] What is to be the upshot? This is a case in which Parliament has provided for the entry of a conviction and passing of sentence but has made no valid law for the measure of sentence. A similar situation arose in *Soon Kim Seng v. Public Prosecutor* [1978] 2 MLJ 107. There, the accused was convicted on 3 charges of having in his possession contrivances capable of being used for the purposes of making infringing copies of textbooks the copyrights of which were vested in the complainant. He was sentenced to a fine of \$1,500 on each of the three charges. He appealed on the ground that the legislation had not provided for any fine or punishment for the possession of a duplicating contrivance. Chang Min Tat J, in allowing the appeal held, with regret, that Parliament had failed to provide a punishment for the offence in question. He accordingly upheld the conviction but set aside the sentence. We must with like regret follow suit. Here, Parliament has said that the appellant shall not, by reason of his age, receive the capital punishment but has made no valid law conferring power upon the courts to impose some other sentence. We would have been inclined to impose life imprisonment in this case but unfortunately our written law does not contain any equipollent provision that exists under Jamaican law.

[17] For the reasons already given the appeal against conviction is dismissed. However, the sentence passed is set aside. We will now hear arguments on the consequential orders that we should make on this appeal.

[18] In conclusion we must say that this is a tragic case. Liyanage and Hinds have been in the law reports since 1967 and 1976 respectively. Both have been applied by our courts long before the Child Act was drafted. It is unfortunate that those charged with the drafting of the Child Act did not pay proper attention to the decided cases. If they had done so, the incongruent and unfortunate circumstances now before this court may well have been avoided. But as judges we have to apply the law as it exists. We simply have no choice whatever in the matter.